

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 6, 2002

IN RE:

**APPLICATION OF BROADBAND INNOVATIONS, INC.
FOR CERTIFICATE TO PROVIDE COMPETING
LOCAL EXCHANGE TELECOMMUNICATIONS
SERVICES**

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**DOCKET NO.
02-00819**

ORDER GRANTING PETITION TO INTERVENE

This matter is before the Tennessee Regulatory Authority (the "Authority" or the "TRA") upon the *Application of Broadband Innovations, LLC for Certificate to Provide Competing Local Telecommunications Services* (the "*Application*"), filed on July 25, 2002. At a regularly scheduled Authority Conference held on September 23, 2002, a majority of the voting panel assigned to this Docket, which consists of Chairman Sara Kyle, Director Deborah Taylor Tate, and Director Ron Jones, voted to appoint the General Counsel or his designee to act as Pre-Hearing Officer in this proceeding to hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

In the *Application*, Broadband Innovations, LLC ("Broadband") requests that the TRA grant Broadband authority to provide competing local telecommunications services, including exchange access telecommunications services, within the state of Tennessee. Broadband makes this request pursuant to Tenn. Code Ann. § 65-4-201, which requires a provider of utility services to obtain from the Authority a certificate of public convenience and necessity ("CCN").

On August 13, 2002, Aeneas Communications, LLC¹ filed a *Petition to Intervene* in this matter. In its *Petition to Intervene*, Aeneas states: “As a competitor, Aeneas has a legal interest in insuring that Broadband complies with the statutes, rules and orders of the Authority. Aeneas therefore has a cognizable interest in the outcome of these proceedings.”²

Aeneas states: “Furthermore, Aeneas believes that the applicant is not a stand alone carrier but intends to offer service in partnership with the Jackson Energy Authority (“JEA”), a municipal-owned electric company.”³ Aeneas states that this belief is based on a statement made by JEA President John Williams to the Jackson City Council on May 7, 2002:

There’s also the telephone business. Now, we’re not interested in the telephone business *per se*. That’s not the interest of the Jackson Energy Authority. But this system is going to be capable of delivering the telephone service to our customers. That’s going to be delivered by another private venture, private local investors, Mr. Curtis Graves, with over 50 years of experience with the telephone business, spanning from SCB to owning his own telephone company, to owning a manufacturing company which manufacture [*sic.*] switches and electronics for 911 systems, and, yes, electronics for the space program... will be investing in this venture. He will be our partner to bring telephone service over our system.⁴

Aeneas states that Mr. Graves is the president of Broadband. Aeneas states that Broadband’s Application makes no reference to the relation between JEA and Broadband or “the applicable statutory requirements which apply to such a joint venture. *See, e.g.* T.C.A. § 7-52-

¹ The *Petition to Intervene* filed on August 13, 2002 states the petitioner’s name as “Aeneas Internet Services, LLC.” In a *Motion to Amend Petition to Intervene* filed on September 24, 2002, the petitioner moves to amend the *Petition to Intervene* by striking “Aeneas Internet Services, LLC” and substituting “Aeneas Communications, LLC.” The *Motion to Amend* states that these companies are affiliates.

² *Petition to Intervene*, August 13, 2002, p. 1.

³ *Id.*

⁴ *Id.*, pp. 1-2.

401 *et seq.* and T.C.A. § 7-52-102(d).”⁵

In its *Objection to Petition to Intervene*, filed on August 29, 2002, Broadband states that Aeneas does not qualify as an intervener pursuant to Tenn. Code Ann. § 4-5-310(b). Broadband denies Aeneas’s allegation that Broadband is not a stand alone carrier. Broadband states that no agreement exists between Broadband and JEA.

Broadband further states:

If Broadband and Jackson Energy Authority do enter into an agreement to provide telecommunications services the contract will not become effective or enforceable until the Tennessee Regulatory Authority has approved the same on petition, and after notice and opportunity to be heard has been extended to interested parties as provided by TCA 7-52-103(9)(d). The issues sought to be raised in the present petition by Aeneas may be raised in a proceeding to approve an agreement between Broadband and Jackson Energy Authority if the parties do enter into such agreement, but the issues are not pertinent to this proceeding and are premature.⁶

Criteria for Permitting Intervention

Tenn. Code Ann. § 4-5-310(a) sets forth the following criteria for granting petitions to intervene:

- (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if;
 - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

⁵ *Id.*, p. 2. Tenn. Code Ann. § 7-52-401 authorizes a municipality that operates an electric plant to “acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services.” This section further provides:

Notwithstanding § 65-4-101(a)(2) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality’s provision of telephone, telegraph and communications services.

⁶ *Objection to Petition to Intervene*, August 29, 2002.

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

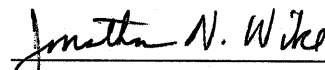
(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

Discussion

The *Petition to Intervene* filed by Aeneas was timely filed and served and substantiated that the legal interests of the intervenor may be determined in this matter. Upon applying the standards set forth in Tenn. Code Ann. § 4-5-310(a), the Pre-Hearing Officer grants Aeneas's *Petition to Intervene*. Whether it is ultimately a "stand alone" carrier or part of a joint venture with a municipality, Broadband would if granted a CCN be subject to the Authority's statutes prohibiting anti-competitive behavior. Because there is a supportable assertion that Broadband may enter into a joint venture with JEA, additional scrutiny is required to avoid the possibility of anti-competitive behavior, and the Authority should examine all available evidence regarding a potential joint venture during the CCN approval process. In any event, Broadband's *Application* for a CCN implicates the legal rights and interests of Aeneas, a potential competitor of Broadband.

IT IS THEREFORE ORDERED THAT:

Aeneas Communications, LLC is hereby given leave to intervene and receive copies of any notices, orders or other documents herein.



Jonathan N. Wike
Pre-Hearing Officer